SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF ORANGE	FILED AND ENTERED ON DATE
In The Matter Of The Application Of EDWARD and CECELIA FALBE,	ORANGE COUNTY CLERK
Petitioners,	Index Nos: 4859/00 5101/01 5061/02
-against-	DECISION & ORDER
TAX ASSESSOR FOR THE TOWN OF CORNWALL,	
Respondents.	
X	

## MOTION TO VACATE AMENDED ORDER

DICKERSON, J.

By Order to Show Cause dated February 4, 2005 the Village of Cornwall-on-Hudson, Orange County, New York [ " Village of Cornwall " ] seeks pursuant to C.P.L.R. § 5015 to vacate an Amended Order submitted, ex parte, and signed by Justice Peter P. Rosato on February 23, 2004 and filed with the Orange County Clerk on March 17, 2004 to the extent the Amended Order directs the Village of Cornwall to pay tax refunds to the

Petitioners, Edward and Cecelia Falbe [ " the Falbes " ] for the years 2000, 2001 and 2002 on the grounds that (1) the Village of Cornwall is a separate assessing unit [ not a party to the instant proceedings ] and as such Petitioners failed to timely file " each year to the Village's Board of Assessment Review for the relief requested as against the Village's yearly tax roll " and failed to file a " separate proceeding...each year against the Village in order to have the court entertain a reduction in the assessment set forth on the Village's yearly tax assessment roll "2, (2) " Further, the Village has no record that it was ever provided with notice pursuant to RPTL § 708(3) of the proceedings commenced against the ( Town of Cornwall's ) assessment rolls and has no record that the Village was ever provided with notice of settlement of the proposed Order or of the ( proposed ) Amended Order "3 and (3) as regards the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02, they must be dismissed because Petitioners did not comply with R.P.T.L. § 708(3) by failing to file with the Orange County Clerk proof of mailing of a " copy of the petition and notice within ten(10) days from the date of service on the Town to the School District, the Commissioner of Finance of Orange County and to the Village of Cornwall-On-Hudson "4. Lastly, the Village of Cornwall seeks the imposition of sanctions against Petitioners' counsel because " The Village should not have been put to the burden and expense of having to defend this meritless attempt to obtain a tax refund on Village assessments that were never challenged "5.

#### Factual Background

The Petitioners, the Falbes, commenced the instant proceeding pursuant to Article 7 of the Real Property Tax Law [ " R.P.T.L. " ] seeking " review of the real property tax assessments made against their property located at 183 Bayview Avenue in the Village of Cornwall-on-Hudson..., Town of Cornwall..., County of Orange...for the tax years 2000, 2001 and 2002...against the Tax Assessor of the Town of Cornwall "6.

According to Petitioners copies of the 2000 Petition with Index Number 4859/00 and the 2001 Petition with Index Number 5101/01 were served, pursuant to R.P.T.L. § 708(3), by mail upon "Jeanne Mahoney Village Clerk...Cornwall-on-Hudson", the "Superintendent of Schools" and the Orange County "Commissioner of Finance "7. Petitioner has provided no evidence that it served copies of the 2002 Petition with Index Number 5061/02 on the aforesaid. Proof of mailing of the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02 was not timely filed with the Orange County Clerk<sup>8</sup> [See R.P.T.L. § 708(3)("Proof of mailing one copy of the petition and notice to...shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section shall result in the dismissal of the petition...")].

## The First Stipulation Of Settlement & Order

On or about June 2, 2003 counsel for the Town of Cornwall and counsel for Petitioners entered into a Stipulation of Settlement<sup>9</sup>
[ " the Stipulation " ] for the tax years 2000, 2001 and 2002 directing " That there shall be audited and allowed and paid to Petitioner by the Respondent Town of Cornwall Assessor and the Cornwall Central School District ( certain tax refunds ) ". The Stipulation became a proposed Order which was signed by Justice Peter P. Rosato on July 22, 2003. The signed Order along with an Application For Refund Of Taxes was served on the Receiver of Taxes for the Town of Cornwall, the Commissioner of Finance for Orange County and the School District Treasurer on October 3, 2003<sup>10</sup> but not upon the Village of Cornwall.

#### Misinformation

On or about November 24, 2003 Petitioners were advised by counsel for the Town of Cornwall " that the Village of Cornwall-On-Hudson utilizes the Town of Cornwall assessment roll to levy Village taxes ( not its own assessment roll ). Therefore, your client is also due a refund of Village taxes. "11 Evidently, this information was false in that the Village of Cornwall " is a separate assessing unit that prepares its own Village real property tax roll each year and that goes through the grievance process that is set forth in Article 5 and 14 of

the RPTL...The statement by the attorney for the petitioners that the Village uses the Town tax roll is without merit and is false. The Village generates its own tax roll each year "12. Counsel for the Petitioners relied upon the misinformation provided by counsel for the Town of Cornwall and, evidently, accepted it as being true without asking Village of Cornwall officials whether it was accurate or making " a simple telephone call to the New York State Office of Real Property Services in Albany to verify the fact that the Village is a separate assessing unit "13.

## The Second Stipulation Of Settlement & The Amended Order

On or about December 1, 2003 counsel for the Town of Cornwall and counsel for Petitioners entered into an Amended Stipulation of Settlement<sup>14</sup> [ " the Amended Stipulation " ] for tax years 2000, 2001 and 2002 directing, among other things, " That there shall be audited and allowed and paid to Petitioner by the Village of Cornwall-on-Hudson ( certain tax refunds )". Counsel for Petitioners again relied upon the veracity of counsel for the Town of Cornwall [ " In conjunction with the Town's attorney "<sup>15</sup> ] and without any further investigation, without any authority from the Village of Cornwall and without any standing or legal basis to assert tax refund claims on behalf of Petitioners against the Village of Cornwall for the years 2000, 2001 and 2002, executed the Amended Stipulation. The Amended Stipulation became a proposed Amended

Order which was presented to Justice Peter P. Rosato [ without notice to the Village of Cornwall ( " failing to give the Village notice of the application to obtain the Amended Judgment in question so that the Village could have objected "16 )] and signed on February 23, 2004. Some ten months later on or about December 28, 2004 Petitioners served the Village of Cornwall with an Application for Refund of Taxes together with a copy of the Amended Order<sup>17</sup>.

#### The Village Protests Immediately

Counsel for the Village of Cornwall immediately protested and advised counsel for Petitioners in letters dated December 30, 2004 and January 10, 2005 that the Village of Cornwall was a "separate taxing unit and is not party to the above proceedings" and that Petitioners were required to file separately to the Village's Board of Assessment Review "for the relief requested as against the Village's yearly tax roll and that a separate proceeding be timely commenced each year against the Village in order to have the court entertain a reduction". In addition, Petitioner's counsel was also advised that the Village had not been provided notice of the proceedings and notice of settlement of the Order or Amended Order. Counsel for Petitioners ignored the request of counsel for the Village of Cornwall to vacate that portion of the Amended Order that applied to it.

#### DISCUSSION

That portion of the Amended Order dated February 23, 2004 which applies to the Village of Cornwall and states that it is " ORDERED, that there shall be audited and allowed and paid to Petitioner by the Village of Cornwall-on-Hudson the amount paid by said Petitioner as taxes for the years 2000, 2001 and 2002 against the original assessment in excess of what the taxes would have been if said assessment had been made as determined by the attached stipulation, without interest, and that such refunds shall be paid within sixty days of this order being executed " [ emphasis added ] is hereby vacated in the interests of justice [ See e.g., State of New York v. Kama, 267 A.D. 2d 225, 699 N.Y.S. 2d 472 ( 2d Dept. 1999 ) ( " The Supreme Court has the inherent authority to vacate a judgment in the interest of justice, even where the statutory one-year period under CPLR 5015(a)(1) has expired "); Rhulen-Immoor, Inc. v. <u>Rivera</u>, 61 A.D. 2d 1116, 1117, 403 N.Y.S. 2d 586 ( 3d Dept. 1978 ) ( " The court has an inherent power to open judgments in the interest of justice ")] and pursuant to C.P.L.R. § 5015(a)(3) [ "fraud, misrepresentation or other misconduct of an adverse party " ] and C.P.L.R. § 5015(a)(4) [ " lack of jurisdiction to render the judgment or order "].

## Misrepresentations & Misconduct: C.P.L.R. § 5015(a)(3)

It is clear that the Village of Cornwall is a separate assessing unit and that the Petitioners failed to timely file " each year to the Village's Board of Assessment Review for the relief requested as against the Village's yearly tax roll " and failed to file a " separate proceeding...each year against the Village in order to have the court entertain a reduction in the assessment set forth on the Village's yearly tax assessment roll "18. As a result of their inaction the Petitioners have no standing to make a claim against the Village of Cornwall for tax refunds for the years 2000, 2001 and 2002. Nevertheless the Petitioners and the Town of Cornwall entered into an Amended Stipulation, without notice to the Village of Cornwall, affecting the rights of the Village of Cornwall. The Amended Stipulation was presented to the Court within the context of an Amended Order, ex parte, again without notice to the Village [ which would have objected and raised the issues raised herein sooner rather than later thus saving the court and parties much time and effort in vacating the Amended Order ].

Both the Petitioners and the Town of Cornwall mislead the Court as to its jurisdiction and authority to sign the ex parte Amended Order affecting the rights of the Village of Cornwall by failing to disclose (1) that the Village of Cornwall was a separate assessing unit and did not use the Town of Cornwall's "assessment roll to levy Village taxes" and (2) that because of their inaction the Petitioners did not have

standing to file a claim against the Village of Cornwall for tax refunds for years 2000, 2001 and 2002 because they failed to timely file " each year to the Village's Board of Assessment Review for the relief requested as against the Village's yearly tax roll " and failed to file a " separate proceeding...each year against the Village in order to have the court entertain a reduction in the assessment set forth on the Village's yearly tax assessment roll "19. These disclosures should have been made so that the Court could have carefully considered whether it had jurisdiction over the Village of Cornwall and, jurisdiction, whether the Petitioners had a legally cognizable claim for tax refunds against the Village of Cornwall, before signing the Amended Order [ See e.g., Woodson v. Mendon Leasing Corporation, 100 N.Y. 2d 62, 68-69, 760 N.Y.S. 2d 727 ( 2003 )( " If...Supreme Court's decision is guilty of having found that plaintiff was read misrepresentation or misconduct...we hold that the court abused its discretion because the record does not support any such conclusion " ); McKinney's, Vol. 7B, C5015:8, p. 473 ( 1992 ) ( " A judgment based upon a fraudulent instrument...or any other item presented to and acted on by the court, whatever its fraudulent component, may be just an intrinsic fraud and hence vacatable only on a direct attack " ) ] .

# Lack Of Jurisdiction: C.P.L.R. § 5015(a)(4)

When the Amended Order was presented for settlement this Court did not have jurisdiction over the Village of Cornwall since it was not a party to the proceeding, was a separate assessing unit against which the Petitioners had no standing to seek a tax refund for the years 2000, 2001 and 2002 and had not received notice of the execution of either the Stipulation or Amended Stipulation nor of the settlement of the Order or Amended Order presented to this Court.

In addition, and as a separate grounds for finding a lack of jurisdiction, with respect to the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02, is the failure of the Petitioners to comply with R.P.T.L. § 708(3) which required that proof of mailing of these two Petitions to, among others, the Village of Cornwall, be filed with the Orange County Clerk " within ten days of mailing ". Such a failure divests the Court of jurisdiction over the Village of Cornwall [ See e.g., R.P.T.L. § 708(3); Matter of Macy's Primary Real Estate, Inc. v. Assessor of City of White Plains, 291 A.D. 2d 73, 75, 738 N.Y.S. 2d 388 ( 2d Dept. 2002 )( " The petitioner did not dispute that it failed to notify the appellant of the proceedings, nor did it set forth a reasonable excuse for its failure to do so...the school district was admittedly never served with notice before a settlement was reached and final judgments entered. circumstances the school district is not bound by the settlement or the

judgments "), leave to appeal denied 99 N.Y.2d 502 ( 2002 ); Allen v. Board of Assessors of Town of Mendon, 57 A.D. 2d 1036, 395 N.Y.S. 2d 815 ( 4th Dept. 1977 )( "Appellant town does not claim lack of actual notice or other prejudice "); Matter of Rose Mount Vernon Corp., v. City of Mount Vernon, 1 Misc. 3d 906(A)( West. Sup. 2004 )( failure to file income and expenses statements with Westchester County Clerk requires that seven Notes of Issue be vacated and four Petitions be dismissed as abandoned ), aff'd 15 A.D. 3d 585 ( 2d Dept. 2005 ); McKinney's, Vol. 7B, C5015:9, p. 474 ( 1992 )( "Before a party can invoke this provision, it must be shown to involve 'jurisdiction 'in the classic sense of power, either over the particular kind of dispute at issue or over a particular party sought to be affected ")].

### Dismissal Of Two Petitions

The Village of Cornwall seeks not only to vacate the Amended Order as it relates to it but also seeks to enforce the provisions of R.P.T.L. § 708(a)(3) which provide that a "Failure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused by good cause shown ". It is clear that the Petitioners failed to file proof of mailing of the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02 on the Village of Cornwall, among others, with the Orange County clerk<sup>20</sup> in violation of R.P.T.L. § 708(3)( "Proof of mailing one copy

of the petition and notice to...shall be filed with the court within ten days of the mailing. Failure to comply with the provisions of this section shall result in the dismissal of the petition..." ). Based upon this violation the Village of Cornwall seeks dismissal of the 2001 and 2002 Petitions.

### The Village Has Standing To Enforce R.P.T.L. § 708(a)(3)

In opposition the Petitioners first argue that "the Village does not have standing to challenge the original Stipulation of Settlement and Order because the Village did not intervene in the action after having received notice of the filing of the action "21. The Village of Cornwall's standing to enforce R.P.T.L. § 708(a)(3) does not depend upon intervening in this proceeding since R.P.T.L. § 708(a)(3) provides that "Neither the school district nor any such county or Village shall thereby be deemed to have been made a party to the proceeding ".

Next, the Petitioners argue that "the town and school district fully complied with the stipulation of settlement in this matter and therefore waived the 708(3) defense "22 and "none of the aforementioned entities [Town of Cornwall, Orange County and the Cornwall Central School District] has challenged the notice requirements of RPTL § 708 "23. To the extent the Town of Cornwall, Orange County and Cornwall Central School District have waived their

rights to enforce the provisions of R.P.T.L. § 708(a)(3) such waivers do not apply to the Village of Cornwall [ See e.g., Matter of Macy's Primary Real Estate, Inc. v. Assessor of City of White Plains, 291 A.D. 2d 73, 77, 738 N.Y.S. 2d 388 ( 2d Dept. 2002 ) ( " Under the new statutory scheme, the City of White Plains could have moved to dismiss, based upon a failure to mail notice to the school district [ and presumably for a failure to file proof of such mailing with the " court within ten days of the mailing " ]...it waived any right to seek dismissal on that ground, by failing to raise the lack of notice to the school district in its answer or by motion to dismiss... However, the waiver by the City of White Plains is not attributable to the school district "), leave to appeal denied 99 N.Y.2d 502 ( 2002 )]. The Village of Cornwall does have standing to enforce the provisions of R.P.T.L. § 708(a)(3) and seek a dismissal of the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02 for a "Failure to comply with the provisions of this section ".

#### Filing Requirements Must Be Enforced

Filing requirements are meant to be complied with and a failure to file "proof of mailing...with the court within ten days of the mailing "means that the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02 must be dismissed [See

e.g., Matter of Rose Mount Vernon Corp., v. City of Mount Vernon, 15 A.D. 3d 585, 791 N.Y.S. 2d 572 ( 2d Dept. 2005 )( " Since petitioner failed to comply with requirements for proper and timely service and filing of requisite income and expense statements pursuant to 22 NYCRR 202.59, Supreme Court properly granted motion to vacate notes of issues and dismiss petitions "), aff'q 1 Misc. 3d 906(A)( West. Sup. 2003 )( " It is clear that Petitioner failed to file the property's income and expenses statements...with the Westchester County Clerk prior to and after issuance of all seven Notes of Issue. This failure constitutes a violation of the filing requirements of 22 N.Y.C.R.R. § 202.59(d)(1) and as a consequence the filed Notes of Issue...must be vacated pursuant to 22 N.Y.C.R.R. § 202.21(e)...The failure to comply with the service and filing requirements of 22 N.Y.C.R.R. §§ 202.59(d)(d)(1) renders all Notes of Issue jurisdictionally defective and, hence, null and void "); Matter of Pyramid Crossgates Company v. Board of Assessors, 302 A.D. 2d 826, 827-828, 756 N.Y.S. 2d 316 ( 3d Dept. 2003 )].

Based upon the foregoing the Amended Order is vacated to the extent that it applies to the Village of Cornwall-on-Hudson, the 2001 Petition with Index Number 5101/01 and the 2002 Petition with Index Number 5061/02 are dismissed pursuant to R.P.T.L. § 708(3) and the request for the imposition of sanctions against Petitioners' attorney is denied.

Dated: White Plains, N.Y. June 20, 2005

HON. THOMAS A. DICKERSON JUSTICE SUPREME COURT

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#### **ENDNOTES**

- 1. Affirmation of John H. Thomas, Jr., Esq. dated January 18, 2005 [ "Thomas Aff. "] at Ex. 1.
- 2. Thomas Aff. at Ex. 3 ( Letter of John H. Thomas, Jr. dated December 30, 2004 to Teneka E. Frost, counsel for Petitioners ).
- 3. Id.
- 4. Supplemental Affirmation of John H. Thomas, Jr., Esq. dated February 10, 2005 [ "Thomas Supp. Aff. "] at paras. 2-3 and Reply Affirmation of John H. Thomas, Jr., Esq. [ "Thomas Reply Aff. "] at para. 3.
- 5. Thomas Reply Aff. at para. 8.
- 6. Affirmation of Teneka E. Frost, Esq., dated March 3, 2005 [ "Frost Aff. " ] at para. 2.
- 7. Frost Aff. at Ex. F.
- 8. Frost Aff. at para. 13 ( " All of those entities were served with notice of the original 2000 and 2001 action,...the petition for the 2002 action was timely filed and served "); Thomas Supp. Aff. at paras. 2-3; Thomas Reply Aff. at para. 3.
- 8. Frost Aff. at Ex. A.
- 10. Thomas Aff. At Ex. B; Frost Aff. at Ex. B.
- 11. Frost Aff. at Ex. C.
- 12. Thomas Reply Aff. at paras. 4 & 5; Thomas Aff. at Ex. A.
- 13. Thomas Reply Aff. at para. 8. The fact that the Village of Cornwall is a separate assessing unit was, clearly, brought to the attention of Petitioners' counsel in two letters from John H. Thomas, Jr. dated December 30, 2004 and January 10, 2005 [ Thomas Aff. at Ex. C ]. Petitioners' counsel did not seek to vacate the Amended Order leading inexorably to the instant proceeding.
- 14. Thomas Aff. at Ex. B; Frost Aff. at Ex. D.
- 15. Frost Aff. at para. 8.

- 16. Thomas Reply Aff. at 8.
- 17. Thomas Aff. at Ex. B.
- 18. Thomas Aff. at Ex. 3 ( Letter of John H. Thomas, Jr. dated December 30, 2004 to Teneka E. Frost, counsel for Petitioners ).
- 19. Id.
- 20. Frost Aff. at Ex. F.
- 21. Frost Aff. at para. 12.
- 22. Frost Aff. at para. 12.
- 23. Frost Aff. at para. 13.